IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.3.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.1090 of 1990 and 353 of 1991

and C.M.P.No.637 of 2007

A.S.No.1090 of 1990
1.S.Parvatham Ammal
2.S.Venkatesan ..Defendants 2 and 1/Appellants

-vs-

T.S.Ganesan ..Plaintiff/Respondent

A.S.No.353 of 1991:-
T.S.Ganesan ..Plaintiff/Appellant

-Vs-

1.Venkatesan
2.Parvatham Ammal(Died)
3.K.Meenakshi
4.S.Thirupurasundari
5.K.Bragathgusambal
6.L.Jayalakshmi ..Defendants/respondents

Sole appellant and first respondent are recognised as LRs of deceased R2. RR3 to 6 brought on record as LRs of the deceased second respondent vide order of court dated 31.1.2007 made in CMP No.19246/2001.

Prayer in A.S.1090 of 1990:- First Appeal filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 19.3.1990 made in O.S.No.50 of 1988 on the file of the Subordinate Judge, Mayiladuthurai.

Prayer in A.S.No.353 of 1991:- First Appeal filed Under Section 96 of the Civil Procedure Code against the Judgment and decree partially decreeing the suit in O.S.No.50 of 1988 dated 19.3.1990 on the file of the Subordinate Judge, Mayiladuthurai.

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Mr.Uma Shankar for the appellant
in A.S.353/1991 and for respondent
in A.S.1090/90

Mr.A.Muthukumar for the respondent
in A.S.353/91 and for appellant in
A.S.No.1090/90

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JUDGMENT

These appeals are filed against the Judgment and decree dated 19.3.1990 made in O.S.No.50 of 1988 on the file of the Sub Court, Mayiladuthurai in and by which the learned Subordinate Judge partly decreed the suit and partly dismissed the suit.

2. For convenience, the parties are referred as arrayed in the Original Suit. The brief facts of the case are as follows:-

3. Plaintiff states as follows:-

3.1. The suit property was originally owned and possessed by one Sethurama Iyer, father of the plaintiff. He died on 14.1.1980. In his life time, he executed a will dated 4.9.1979 bequeathing the suit property in the name of the plaintiff.

3.2. The plaintiff taken possession of the suit property and enjoying the same and paid kist for the suit land. Patta No.6 was issued in favour of the plaintiff.

3.3. The defendants have no right to the suit property. They have colluded together and attempting to dispossess the plaintiff from the suit property. They are also questioning the right of the plaintiff in respect of the suit property. The defendants are threatening to encroach upon the suit property by illegal means. Hence the suit.

4. Defendants state as follows:-

4.1. The suit property, no doubt, is situate at Umambalpuram and the same belong to Sethurama Iyer. The Will dated 4.9.79 is also admitted. The suit properties are in patta NO.6. But those properties are given to the second defendant absolutely. In the said will, two coconut thopes situate north of river Cauvery Karai, are given to the 2nd defendant absolutely; pattah also was changed in the name of 2nd defendant by the proceedings of the Tahsildar, Mayiladuthurai No.139/83-84 – sub-division 2/2, dated 22.3.1984. All the suit properties, except R.S.No.7/2 is in the name of the second defendant.

4.2. The suit properties also do not belong to the plaintiff. They will not come under the category of "விடுபட்ட சொத்துக்கள்" The suit properties, except RS.S.No.7/2 were specifically given to second defendant. Hence, the plaintiff has no title or possession of the suit properties. R.S.No.7/2 measuring 42 cents was given in exchange on 13.10.1981 by the plaintiff to one N.Chandrasekaran. The same is a trust property dedicated to the pillayar temple. The plaintiff has no right over the said property in his individual capacity.

4.3. Being the trust property, the plaintiff is not competent to give in exchange to third-parties, and the first defendant is making arrangements to cancel the same. Even the said item is in the possession

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of the 1st defendant. Being the eldest son, he succeeded to the post of the Trusteeship. The first defendant is managing the property, on behalf of the 2nd defendant.

4.4. The plaintiff has asked only for relief of declaration and injunction in respect of the ground site. No relief was asked in respect of the standing trees. There is also a Bore-pumpset in R.s.No.7/3. It was installed by the second defendant and the electric connection also is in her name. The plaintiff by paying a nominal court fee is attempting to get declaration for the trees as well as the pump-set. The item numbers 9 and 7 in the suit property formerly were nanja property and they have been converted to punja subsequently. Hence, the suit is liable to be dismissed.

5. Plaintiff examined as P.W.1. Ex.A.1 to Ex.A.23 were marked on the side of the plaintiff. 2nd defendant examined as D.W.1. One Mr.Venugopal examined as D.W.2. Ex.B.1 to Ex.B.11 were marked on the side of the defendants to confront the claim of the plaintiff. Ex.C.1 to Ex.C.7 were marked on as Court Exhibits.

6. Upon hearing the rival claims and analysing the evidence on record, the lower court decreed the suit in respect of item Nos. 1, 3 to 7 and 9 of the suit property while dismissing the suit in respect of item No.2 and 8 of the suit property.

7. The plaintiff filed A.S.353 of 1991 against the dismissal of the suit with reference to item no.8 of the suit property. Whereas, defendants 1 and 2 filed A.S.No.1090 of 1990 against the decree in respect of item nos.1, 3 to 7 and 9 of the suit property.

8. Heard Mr.Umashankar, learned counsel for the plaintiff and Mr.A.Muthukumar for the defendants.

9. Learned counsel for the plaintiff/appellant while reading the Will of the testator, which is the subject matter of the suit expressed the mind of the testator contending that the suit properties excluding item No.2 bequeathed in the name of the plaintiff/appellant by the testator and that the plaintiff taken possession of the same and enjoying it after transferring patta No.6 in his name and therefore, the plaintiff is entitled to suit claim.

10. Learned counsel for the defendants/appellants contended that two coconut thopu referred in the Will, which is the subject matter of the suit is with reference to the suit property except item No.2 and that patta of the same was transferred in the name of the second defendant and that the suit properties are in the enjoyment of the defendants and therefore, the plaintiffs are not entitled to the suit claim.

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11. Upon hearing the various submissions of the counsel on record in respect of right of the parties with reference to suit items, the points for determination are:-

(1)Whether item No.8 and land in Survey number 5/11 and survey number 6 form part of one unit reflecting Coconut Thopu under the enjoyment of the defendants?

(2)Whether the finding of the lower court in dismissing the suit with reference to item No.8 of the suit property is in order?

(3)Whether item No.6, 7 and 9 of the suit property form part of one unit referable to coconut thopu under the enjoyment of the plaintiff?

(4) Whether the finding of the lower court in decreeing the suit for title with reference to item Nos.6, 7 and 9 of the suit property is in order?

(5)Whether the plaintiff is in enjoyment of item Nos.6, 7 and 9 of the suit property to sustain his claim of permanent injunction against the defendants?

(6)Whether item nos.1, 3 and 5 of the suit property form part of one unit referable to Bamboo clusters?

(7)Whether the plaintiff has got a claim over item Nos.1, 3 and 5 of the suit property?

(8)Whether the plaintiff is not in possession of item No.1, 3 and 5 of the suit property?

(9)Whether the plaintiff is in possession and enjoyment of item Nos.1, 3 and 5 of the suit property to sustain his claim of permanent injunction against the defendants?

(10)Whether the finding of the lower court in decreeing the suit for title with reference to item nos.1, 3 and 5 of the suit property is in order?

(11)Whether item No.4 is the family property of the plaintiff and the defendants?

(12)Whether patta for item No.4 of the suit property transferred in the name of the second defendant?

(13)Whether the plaintiff can have a claim over item No.4 of the suit property as the same not reflect in the sketch Ex.A.9 filed by the plaintiff to sustain his claim?

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12. Point No.1:-

12.1. Suit properties are referred to nine items as follows:-

சொத்து விவரம்

மயிலாடுதுறை தாலுக்கா, 38.2 உமாம்பாள் புரம்

வ.எண்.	ஆர்.எஸ்.எண்		செண்ட்ஸ்	
1.	ஆர்.எஸ்.எண்	4/2	0.17 செண்ட்ஸ்	0.81
2.	ஆர்.எஸ்.எண்	7/2	0.42 செண்ட்ஸ்	2.10
3.	ஆர்.எஸ்.எண்	7/9	0.04 செண்ட்ஸ்	.19
4.	ஆர்.எஸ்.எண்	14/3	0.34 செண்ட்ஸ்	1.62
5.	ஆர்.எஸ்.எண்	7/7	0.23 செண்ட்ஸ்	1.09
6.	ஆர்.எஸ்.எண்	14/5	1.90 செண்ட்ஸ்	9.03
7.	ஆர்.எஸ்.எண்	14/6	0.53 செண்ட்ஸ்	2.52
8.	ஆர்.எஸ்.எண்	7/3	1.76 செண்ட்ஸ்	8.36
9.	ஆர்.எஸ்.எண்	368/2	0.30 செண்ட்ஸ்	1.50
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	கூடுதல்		5.69	27.22
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Out of which, the plaintiff has given up his claim in respect of 2nd item of property. Similarly, the land in S.No.5/1 and S.No.6, which is under the enjoyment of the defendant was not under dispute not included in the suit item. It is also admitted that the land in S.No.6 and 5/1 referred to Coconut thopu according to plaintiff.

12.2. The second defendant while alive executed a will in respect of the properties obtained by her under the will which is marked as Ex.A.1, the subject matter of the suit bequeathing the properties in favour of the first defendant. The said swill is unregistered.

12.3. The earlier will executed by her in respect of the very same property which is marked as ex.A.19 was not given effect to. D.W.1 also has spoken in detail about the will executed by her in favour of D.1. So much so, she has also stated that the earlier will executed by her in favour of the plaintiff was not given effect to.

12.4. P.W.1 in fact elicited these points at the time of cross-examination of D.W.1. Her evidence in this regard is as follows:-

"வழக்கு நிலுவையில் இருக்கும் போது 1987ல் தாவா சொத்தின் ஒரு பகுதியை எனக்கு இருதயநோய் இருப்பதால் முதல் எதிர்வாதியின் பெயரில் ஒரு செட்டில்மெண்ட் எழுதி வைத்திருந்தேன். சின்ன பையனுக்கு உயில் எழுத வேண்டும் என்று நினைத்து ஒரு உயில் எழுதினேன். அது அமுலுக்கு வரவில்லை."

12.5 This part of evidence at the time of cross-examination by the plaintiff given a quiteous to the genuineness of the wills referred above.

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12.6. The genuineness of the will executed in favour of the first defendant was not confronted by the plaintiff. So, there cannot be any objection at all by the plaintiff in accepting the genuineness of the will. So, the genuineness of the will binds the plaintiff as it was subjected to cross examination at the will of the plaintiff, though it was not the subject matter of litigation on hand, So I hold that the genuineness of the will in favour of the first defendant has been proved.

12.7. It is a specific case of the plaintiff that two Coconut thopu referable in the will related to two Coconut thopu situated in the land in S.No.6 and 5/1 and not with reference to any land consists of Coconut thopu and therefore, plaintiff claims absolute right in respect of land in S.No.7/3. Whereas, learned counsel for the defendants/appellant submitted that the land in S.No.7/3, 6 and 5/1 together form part of one unit as the same is equated to one Coconut thopu as per the recitals in the said Will and therefore, the plaintiff had no right in land in S.No.7/3. It is also the case of the defendants that the land in S.No.7/3, 6 and 5/1 are under the enjoyment of the defendant which fact was confronted by the learned counsel for the plaintiff.

12.8. Now, let me refer the evidence of P.W.1 and also the Commissioner's report which are marked as Ex.C.1 to Ex.C.7 coupled with Ex.B.2 and Ex.B.3 to find out the genuineness of the submissions of the parties to the proceedings. Ex.B.3 is Adangal which was not disputed by the plaintiff. Adangal register proves the enjoyment of the land as per this issue is concerned.

12.9. Now, I have to find out whether the plaintiff has got a claim over the land in Survey No.7/3 coupled with the enjoyment with reference to the same. There is no dispute as per Adangal extract which was marked as Ex.B.3. The defendant was in enjoyment of the land in Survey No.7/3 as on 31.10.1984. The suit was filed on 27.10.84. According to the plaintiff, he was in enjoyment of the land in S.No.7/3 on the date of the filing of the suit. In the ground reality, the plaintiff was not in possession of the land in S.No.7/3 as per Ex.B.3. Ex.B.3 was not questioned by the plaintiff while the same was marked through the defendant. If the plaintiff was really in enjoyment of the land in S.No.7/3, his name would find a place in Adangal extract. The plaintiff has not chosen to file any Adangal extract to confront the claim of the defendant. So, I am of the view that the document viz., Ex.B.3 is an undisputed document. This is one way of approach to render a finding that the defendants is in enjoyment of the land in S.No.7/3.

12.10. The land in S.No.7/3 is in the enjoyment of the defendant. Admittedly, patta of the land in S.No.7/3 was transferred in the name of the second defendant. Ex.B.2 is the proof to this fact. B.4 is the Chitta. The land in S.No.7/3 as per chitta also has been transferred in the name of the second defendant.

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12.11. Now let me look into the Commissioner's plan and report to find out whether the land under dispute is in one unit under the enjoyment of the plaintiff or otherwise. It is admitted by the plaintiff that the disputed land was inspected by the Advocate Commissioner in the presence of the plaintiff and the defendant. The important recitals in respect of this issue referred to in Ex.C.1 reads as follows:-

"வாதியின் வழக்கறிஞர் கே.சுந்தரராஜன் அவர்களும் பிரதிவாயின் வழக்கறிஞர் கே.சுப்பிரமணியன் அவர்களும் உடன் இருந்து தாவா இடத்தை சுட்டிக் காட்டினார்கள் "

....."தாவா இடமானது இரண்டு ஏக்கருக்கு அதிகமான தென்னம் தோட்டம். அதில் கணக்கில் அடங்காத தென்னை மரங்களும், பாக்கு மரங்களும், 5 பலா மரங்களும் இரண்டு பெரிய மாமரங்களும் உள்ளன. இதில் முன் பகுதியில் ஒரு மோட்டர் பம்புசெட் கட்டிடம் உள்ளது.

....."பம்புசெட்டுக்கு அருகாமையில் தெற்கே உயிருடன் உள்ளது. இந்த இரண்டும் வெட்டப்படாத உயிர் மரங்கள். வெட்டப்பட்ட மரங்கள் இரண்டு.".

....."தாவா இடம் மிகப்பெரிய தோட்டமாக இருப்பதால் தென்னை மரங்களும், பாக்கு மரங்களையும் எண்ணும் அளவில் இல்லை. மரங்கள் அதிகமாக உள்ளது. ஏனைய இரண்டு மாமரங்களும் நல்ல விலையில் உள்ளது."

Along with the report, two sketches were filed by the Advocate Commissioner.

12.12. On a perusal of the sketches along with the report of Ex.C.1, I found that the disputed land in this issue form part of one unit; Motor shed found in survey number 7/3. Water Tub is also found in Survey number 7/3. From this water tub, water is drawn to irrigate the land in respect of other survey numbers more particularly in S.No.5/1 and 6. Similarly, the 1st part of the report in Ex.C.3 relates to the land in Survey numbers under dispute in this issue. Similarly, the first part of the report in Ex.C.5 reflects the land in dispute in this issue. So much so, the first part of the report in Ex.C.6 also reflects the land under dispute in this issue. The sketch in Ex.C.7 would also prove that the disputed land in this issue form part of one unit.

12.13. Now let me look into the evidence of P.W.1 to find out the real truth in this regard. The evidence of P.W.1 in this regard reads as follows:-

"அயிட்டம் 8 சர்வே எண் 7/3 பாக சொத்து இருக்கிறது. அதில் மாமரம் பலா மரம் இருக்கின்றன. சர்வே எண் 7/3 உயில் சரத்துபடி எனக்கு கிடைக்கவேண்டிய சொத்து. சர்வே எண் 7/3 அதற்கு கிழக்கே உள்ள சொத்து சர்வே எண் 6/3 ஆகும். அது எனது தாயாருக்கு பாத்தியப்பட்ட தென்னந்தோப்பு. அதற்கும் கிழக்கே 5/1 தென்னந்தோப்பு ஆகும். அதுவும் எனது தாயாருக்கு சொந்தமானது. "

".....எனது தகப்பனார் பெயரில் இருந்த மோட்டார் செட் 7/3இல் இருந்தது. அந்த மின் இணைப்பு எனது தகப்பனார் பெயரிலிருந்து எனது தாயார் பெயருக்கு மாற்றும் போது எனது தாயாருடன் ஒரே குடும்பத்தில் இருந்தேன்.....".

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".....1983இல் நான் பராமரித்து வந்த டைரியில் அக்கறை கொல்லை என்று கைப்பட எழுதி இருக்கிறேன். 7/3, 6/3, 5/1 ஆகியவற்றைதான் அக்கறை கொல்லை என்று மேற்படி வீதம் எனது டைரியில் விவரித்து இருக்கிறேன். அந்த குறிப்பு அடங்கிய டைரி எ.சா.ஆ.1. கீழ் அக்கறை கொல்லை என்றும் அந்த டைரியில் குறிப்பு எழுதியிருக்கிறேன். 5/1, 6, 7/3 ஆகியன எனது சிறிய பாட்டி வாளாம்பாளுக்கு சொந்தமானது....."

".....7/3, 6, 5/1 ஆகியன மூன்றும் காவிரி கரைக்கு வடக்கில் இருக்கிறது....."

12.14. The evidence of P.W.1 as narrated above would also show that the land under dispute form part of one unit. So much so, they are under possession and enjoyment of the defendants. Defendants are paying consumption charges to the Electricity Department. Ex.B.7, 8 and 9 are the receipts. No where it was stated by the plaintiff that the motor shed is under his occupation and paying consumption charges to Electricity Department for the same. As per Adangal, land in S.No.7/5, 5/1 and 6 is in the enjoyment of the defendants. From the narration of the events, I am satisfied that the land in Survey Number 7/3, which is item No.8 in the suit schedule is under the enjoyment of the defendants reflecting Coconut thopu and as such, the plaintiff cannot have a claim over the same. Therefore, this point is answered against the plaintiff.

13. Point No.2:- In view of the finding rendered in Point No.1 , I am satisfied that the plaintiff cannot have a claim over the land in Survey No.7/3, which is item No.8 of the suit property. The lower court has rightly taken note of the ground reality of the evidence available on record and rightly rejected the claim of the plaintiff with reference to item no.8 of the suit property. The lower court finding is in order and does not require any interference. Hence, this point is answered in favour of the plaintiff.

14. Point No.3:-

14.1. Learned counsel for the plaintiff reiterated the contention made in point no.1 and contended that the land in item Nos.6, 7 and 9 are not related to coconut thopu and as such, the plaintiff is entitled to further relief. Learned counsel for the defendants reiterated the submissions made at point no.1 and submitted that the land referable to item nos.6, 7 and 9 is a coconut thopu as one unit as per will and as such, the plaintiff cannot have a claim over the same.

14.2. In this context also, it is useful to refer the evidence of P.W.1 coupled with court Exhibits and the documents filed on the side of the plaintiff and the defendants to find out the genuineness of the case of the parties to the suit. The Commissioner's report marked as Ex.C.3 deals the point in this regard which reads as follows:-

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1)தெற்கு வடக்கு குத்தாலம் அஞ்சாறுவார் தலை ரோட்டடிற்கும் மேற்கே சர்வே எண்.14/5, 1 ஏக்கர் 90 செண்ட்,

2)14/6ல் 0.53 செண்ட்

3)14/3ல் 0.34 செண்ட் ஆக 2.77 விஸ்தீர்ணம் உள்ள இடம்.

4)இந்த இடத்துக்கு வடக்கே சர்வே எண். 368/2ல் 0.30 செண்ட் நஞ்சை தரிசு கிடக்கிறது. இதில் இரண்டு தென்னை மட்டும் உள்ளது.

5)இந்த இடம் நான்கு பக்கமும் உயிர் வேலிகளால் அடைக்கப்பட்டு மூங்கில் கேட்டுகளால் இரும்பு பூட்டு போட்டு பூட்டப்பட்டு இருந்தது. <u>எதிர்மனுதாரர் வேலையாள் ஒருவர் திறந்து விட்டார்.</u>

<u>6) List of assets:-</u>

1.காய்க்கக் கூடிய தென்னை மரங்கள்	120
2.பாக்குமரங்கள்	33
3.பனை மரங்கள்	15
4.சவுக்கை மரங்கள்	2
5.பெரிய மாமரங்கள்	12
6.புளிய மரங்கள்	3
7.நெல்லி மரங்கள்	7
8.வேம்பு	1
9.தேக்கன் மரங்கள்	4
10.நாகலிங்க மரம்	1
11.தூங்கு மூஞ்சி பெரிய மரம்	4
12.தூங்கு மூஞ்சி சிறிய மரம்	2
13.எலுமிச்சை	1
14.மாங்கன்று	1
15.இலுப்பை	1
16.ஒதியன்	1
17.பூவரசு	2
18.கேணி பழைமையானது	1

The above report is with reference to the land situated in S.No.14/5, 14/6 and 368/2. As per the sketch and report, they form one unit. About 120 coconut trees found there. The evidence of P.W.1 in this regard reads as follows:-

> ".....9வது அயிட்டம் சர்வே எண் 368/2 திருமனஞ்சேரி கிராமத்தை சேர்ந்தது. 368/2 தனியாக இருக்கிறது. 14/6, 14/5ம் ஒரே வேலி அடைப்பக்குள் இருக்கின்றன. சர்வே எண் 14/6 தாவாவில் நஞ்சையாக கொடுத்து இருக்கிறேனா.....சுமார் 10 வருடங்களாக தரிசாக இருக்கிறது. 14/5, 14/6 ஆகியன ஒரே அடைப்புக்குள் ஒன்றாகவே இருக்கிறது."

14.3. Though this witness have stated that the land in s.No.368/2 is separate situated in Thirumanancheri Village, as per Ex.A.9, this land is abutting to the land in Survey No.14/6. Land in S.No.368/2 and 14/6 are contiguous to each other. They are situated on the western side of the road. In fact, Ex.A.9 relied on by the plaintiff to sustain his claim. The Commissioner's report and Ex.A.9 would show that the land in S.No.14/5, 14/6 and 368/2 form part of one item situated on the western side of the road. These lands are encircled with a fence. As per the

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Commissioner's report, the servant of the defendants has opened the gate for inspection. The evidence of P.W.1 in this regard reads as follows:-

.....*"நீதிமன்ற ஆணையர் வழக்கிடை சொத்தை பார்வையிட வந்தபோது அதற்கான பூட்டு சாவியை யாரோ ஒருவர் வந்து கொடுத்தார். அது யாருடைய ஆள் என்று எனக்கு தெரியாது. வழக்கிடை சொத்துக்கு பூட்டு, சாத்து கிடையாது. ராமகிருஷ்ணன் என்ற ஆளை நான் வேலைக்கு வைத்துள்ளேன். நீதிமன்ற ஆணையர் வந்தபோது பூட்டு சாவி யார் கொடுத்தது என்று தெரியாது. கேட்டும் தெரிந்துக் கொள்ளவில்லை....."*

14.4. The Adangal extract, chitta and patta would show that these lands are under the possession and enjoyment of the defendants.

14.5. However P.W.1, in his evidence stated that he employed one Ramakrishnan to take care of the disputed property. His evidence in this regard reads as follows:-

".....*ராமகிருஷ்ணன் என்ற ஆளை வேலைக்கு வைத்துள்ளேன்."*

The plaintiff has not stated in the plaint that the suit property was under the control of one Ramakrishnan employed by him. Even otherwise, the plaintiff not examined the said Ramakrishnan to prove that the suit property was under the control of the said Ramakrishnan who was employed by him. The Adangal extract would show that the disputed property was under the enjoyment of the defendants.

14.6. The Adangal extract, chitta and patta are the documentary evidence shows that the disputed land form part of one item referable to Coconut Thopu under the enjoyment of the defendants.

14.7. However, the lower court has not analysed the evidence of oral and documentary evidence in right perspective and held wrongly that the disputed item is not Coconut thopu and ultimately decreed the suit in favour of the plaintiff.

14.8. In such view of the fact, I am of the considered view that the disputed item Nos.6, 7 and 9 form one unit and is in enjoyment of the defendants. Therefore, the plaintiff is not entitled to the suit claim. Therefore, the finding of the lower court in this regard is liable to be set aside and accordingly set aside. Hence, this point is answered against the plaintiff.

15. Point Nos.4 and 5:- In view of the finding rendered in Point No.3, I am constrained to hold that the finding of the lower court in this regard is not in order and therefore the same is set aside. These points are answered against the plaintiff.

16. Point Nos.6 and 7:-

16.1. No doubt, it is true that item Nos.1, 3 and 5 of the suit property form part of one unit referable to Bamboo clusters. It is not the case of the defendants that the land referable to Bamboo clusters allotted to the second defendant by the testator in the said will. Even

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according to the plaintiff, the coconut thopu allotted to the second defendant situate on the north of Cauvery river. The evidence of D.W.1 in this regard reads as follows:-

".....கீழண்டை கொல்லை மேலண்டை கொல்லை இரண்டைய ,ம் நான் சர்வ சுதந்திரமாக அடையவேண்டும் என்று எனது கணவர் உயிலில் எழுதி வைத்திருக்கிறார். காவிரி கரைக்கு வடக்கே உள்ள தென்னந்தோப்ப ,கள் 2 என்று உயிலில் அவர் கண்டிருப்பது கீழண்டை மற்றும் மேலண்டை இருக்கக்கூடிய எங்களது தாவா சொத்தைத்தான் குறிக்கும்....."

The recital in Ex.A.1 reads as follows:-

".....குத்தாலம் காவேரி கரைக்கு வடக்கில் உள்ள தென்னந்தோப்ப ,கள் இரண்டையும் என் சம்சாரம் சர்வ சுதந்திர பாத்தியமாய் அடைந்து கொள்ள வேண்டியது. "....

16.2. In the will, it is stated that the two Coconut thopu allotted to second defendant situated on the north of the Kuthalam Kaveri River. The disputed bamboo clusters situated on the southern side of the Cauvery River. There is no reference in the Will about the allotment of any kind of land to the second defendant with reference to the land viz., Land with Bamboo clusters on the southern side of the Cauvery River. In such view of the fact, the defendants cannot have a claim over these lands.

16.3. The land in item No.1, 3 and 5 of the suit property form part of one unit referable to bamboo clusters and not referable to Coconut thopu. In such view of the fact, the plaintiff is entitled to claim over such land.

16.4. The lower court has rightly held that the plaintiff is entitled to claim over the land referable to item no.1, 3 and 5 of the suit property. The finding of the lower court is in order and does not require any interference. Hence, these points are answered in favour of the plaintiff.

17. Point No.8:-

17.1. The evidence available on record would show that the lands in item Nos.1, 3 and 5 of the suit property are in possession and enjoyment of the defendants. Even according to the plaintiff, his alleged possession in respect of the suit property is only by proxy. According to him, one Ramakrishnan was looking after the suit property. He has not chosen to examine the said Ramakrishnan to prove possession of the disputed land by proxy. Whereas the Adangal extract would show that the defendant alone is in enjoyment of the suit property. If really the plaintiff is in enjoyment of the suit properties with reference to the item nos.1, 3 and 5 of the suit property, his name would definitely find a place in the Adangal extract. The plaintiff miserably failed to file Adangal Extract to prove his possession. In the absence of production of documentary evidence an adverse inference has to be drawn against the plaintiff.

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17.2. Whereas the defendant produced Adangal, Chitta and patta to prove his possession and enjoyment. In such view of the fact, the plaintiff is not entitled for permanent injunction in respect of those property as the same was in possession and enjoyment of the defendants. Hence, this point is answered in favour of the defendants.

18. Point No.9:-

In view of the finding rendered in point No.8 the finding of the lower court in granting permanent injunction in respect of these items of the property cannot sustain and therefore the finding of the lower court in this regard is liable to be set aside and accordingly set aside. Hence, this point is answered against the plaintiff.

19. Point No.10:- In view of the finding rendered in point nos.6 and 7, I am of the considered view that the finding of the lower court in decreeing the suit for title with reference to item Nos.1, 3 and 5 is in order and does not require any interference. Hence, this point is answered in favour of the plaintiff.

20. Point No.11:-

The plaintiff claims titled over item No.4 of the suit property. Though the defendants stated that item no.4 is not in family property of the plaintiff and the defendants, the patta relied by them would show that patta for this land was transferred in the name of the second defendant. Therefore, I am of the considered view that item no.4 is the family property of the plaintiff and the defendant for which patta has been transferred in the name of the second defendant. Hence this point is answered accordingly.

21. Point No.12 and 13:-

21.1. The plaintiff relied on Ex.A.9 to sustain his claim. However, there is no reference to item no.4 of the suit property in Ex.A.9 and no explanation was offered by the plaintiff for such omission. According to the evidence and also patta, this item is in enjoyment of the defendant. There are coconut trees and bamboo clusters standing in the land in Survey No.14/3 which is under dispute. Commissioner's report, Plan of Ex.A.9 would show that the land in S.No.14/3 form part of one unit along with land in S.No.14/5, 14/6 and 368/2 (Item Nos.6, 7 and 9)

21.2. Patta for this property is standing in the name of the second defendant. Documents Ex.A.9, Ex.B.3 and Ex.B.4 together shows that the plaintiff cannot claim with reference to item no.4 of the suit property. Therefore, the finding of the lower court in granting decree in this regard is not in order and the same is liable to be set aside and accordingly it is set aside and hence these points are answered against the plaintiff.

22. (I)In the result, A.S.353/91 fails and accordingly dismissed.

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However, the parties have to bear their respective costs.

(II) In the result, A.S.1090/90 is allowed in part with the following findings:-

(i)Judgment and decree of the Lower Court in respect of item No.6, 7, 9 and 4 is set aside and accordingly, the suit is dismissed for relief of title and permanent injunction.

(ii)Judgment and decree of the Lower Court in respect of item Nos.1, 3 and 5 in set aside and the suit is dismissed for relief of permanent injunction only.

(iii)The decree in respect of other aspect is sustained.

(iv)However, the parties have to bear their respective costs.

Consequently, C.M.P.No.637 of 2007 stands closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nvsri

To
1. The Subordinate Court, Mayiladuthurai.
2. The Section Officer, VR Section,
High Court, Madras.
+ 2 CCs to Mr.A.Muthukumar, Advocate SR NO 17337 & 17338
+ 2 CCs To Mr. C.Umashankar, Advocate SR NO.17226 and 17227

A.S.Nos.1090 of 1990
and 353 of 1991

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